Supreme Court, U.S
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No. 01-

IN THE

# Supreme Court of the United States

BILLY GILCHRIST JR.,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. Whether the decision in the instant case, as well as the decision upon which it is based, *United States v. Nealy*, conflict with prior decisions of this Court and the Courts of Appeals holding that the failure of an indictment to allege an essential element of a crime is a jurisdictional defect which can be raised at any time.

II. Whether the decision in the instant case as well as the decision upon which it is based, *United States v. Nealy*, conflict with the well settled precedent of this Court that decisions rendered while a case is on direct review are retroactive to the case on appeal.

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Billy Gilchrist Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

## OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is unpublished (App. A).

## STATEMENT OF JURISDICTION

The Eleventh Circuit Court of Appeals entered judgment in Case No. 99-14064-AA on April 10, 2001 (App. A). Rehearing was denied on June 15, 2001 (App. D). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

United States Constitution: Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution: Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Federal Rule of Criminal Procedure 12(b)

**(b) Pretrial Motions**. And defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial.

* * *

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings: or

* * * *

## STATEMENT OF THE CASE

Following a jury trial before the District Court for the Middle District of Florida, Petitioner Billy Gilchrist, Jr. was found guilty of conspiracy to possess with the intent to distribute crack cocaine in violation of Title 21, United States Code, Section 846. (Count I). Petitioner was found not guilty of possession of crack cocaine with the intent to distribute, in violation of Title 21, United States Code, Section 841(a)(1). (Count II).

Petitioner was subsequently sentenced to life imprisonment. Petitioner thereafter took an appeal from his conviction and sentence. Following the filing of his initial and reply briefs, this Court announced its decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Petitioner thereafter raised an *Apprendi* claim in a Supplemental Brief. The Eleventh Circuit affirmed Petitioner's conviction and sentence and held that the *Apprendi* claim had been abandoned, relying upon its earlier decision in *United States v. Nealy*, 232 F.3d 830 (11th Cir. 2000).

## REASONS FOR GRANTING THE WRIT

### I.

### THE DECISION IN THE INSTANT CASE, AS WELL AS THE DECISION UPON WHICH IT IS BASED, *UNITED STATES v. NEALY*, CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND THE COURTS OF APPEALS HOLDING THAT THE FAILURE OF AN INDICTMENT TO ALLEGE AN ESSENTIAL ELEMENT OF A CRIME IS A JURISDICTIONAL DEFECT WHICH CAN BE RAISED AT ANY TIME.

Under the decision of this Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) the indictment against Petitioner was defective since it failed to delineate the amount of crack cocaine Petitioner conspired to posses with the intent to distribute. The Eleventh Circuit, however, refused to consider Petitioner's *Apprendi* claim on the grounds that Petitioner's failure to raise the defect in the indictment before the District Court constituted an abandonment of that issue on appeal.[1] The decision of the Eleventh Circuit stands in conflict with prior precedent of this Court as well as the various Courts of Appeal. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court held that "any fact [other than a prior conviction] that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." That drug quantity is an element

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1. [B]ecause he raised for the first time in his supplemental brief his challenge to the indictment's failure to include the amount of cocaine base as an element of the crime to be proven beyond a reasonable doubt, the issue is abandoned. *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000).

of Section 841 offenses which must be submitted to the jury and proven beyond a reasonable doubt has been recognized by every circuit that has confronted the issue including the Eleventh Circuit. *United States v. Rogers*, 228 F.3d 1318 (11th Cir. 2000); *United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000) (holding that *Apprendi* requires that drug quantity in section 841 cases must be charged in the indictment and proven beyond a reasonable doubt before a jury, and overruling circuit precedent to the contrary); *United States v. Aguayo-Delgado*, 220 F.3d 926, 933 (8th Cir. July 18, 2000) (holding that Apprendi applies in the context of drug convictions under section 841 and overruling circuit precedent to the contrary); *United States v. Rebmann*, 226 F.3d 521 (6th Cir. 2000) (holding that a determination whether the distribution of drugs caused death or serious bodily injury, which would increase a defendant's sentence under section 841, is an element of the offense after *Apprendi*); and *United States v. Angle*, __ F.3d __ (4th Cir. 2000) the Fourth Circuit held that in light of *Apprendi*, drug quantity is an *element* of §§ 841(b)(1)(A), because §§ 841(b)(1)(A) allows findings of quantity to expose defendants to greater penalties than the maximum penalties authorized in the fallback penalty provision for schedule I and II drug offenses, §§ 841(b)(1)(C).

The Fifth and Sixth Amendments demand that a grand jury indictment set forth each essential element of an offense. *Russell v. United States*, 369 U.S. 749, 763-65 (1962); In *Russell*, this Court reiterated that an indictment to be sufficient must: (1) contain the elements of the offense intended to be charged; (2) sufficiently apprize the accused of what he must be prepared to meet; and (3) enable the accused to plead a judgment under the indictment as a bar to any subsequent prosecution for the same offense. *Id.* at 763-64.

This Court stated that these criteria reflect "the protections which an indictment is intended to guarantee." *Id.* at 763. *See also United States v. Debrow*, 346 U.S. 374, 376 (1953). "It is settled law that in order for an indictment to be valid it must allege all of the elements which are necessary to constitute a violation of the statute." *Davis v. United States*, 253 F.2d 24, 25 (6th Cir. 1958); *see also United States v. Richman*, 369 F.2d 465, 467 (7th Cir. 1966). "An indictment or information does not charge a crime, and a conviction based thereon cannot stand, if there is not set forth in such indictment or information the elements of the offense sought to be charged." *Carlson v. United States*, 296 F.2d 909, 910 (9th Cir. 1961); *see also United States v. Manuszak,* 234 F.2d 421, 423 (3d Cir. 1956). The principle that objection that an indictment fails to state an essential element of a crime may be raised at any time is codified in the Federal Rules. Fed. R. Crim. P. 12(b)(2)

The Eleventh Circuit has set about to ignore this well settled precedent by finding abandonment even in cases, such as the one at bar, where the authority upon which the claim is raised is based upon a decision of this Court announced after the case was on appeal. Not only does this new rule of procedure conflict with the jurisprudence of this Court it also creates an unnecessary and unwarranted break with the decisions of the various Circuit Courts of Appeals.[2]

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2. The instant case although unpublished relied upon the Court's earlier decision in *United States v. Nealy*, 232 U.S. 830 (11th Cir. 2000). *Nealy* relied upon *United States v. Blasco*, 702 F.2d 1315, 1332 n.28 (11th Cir. 1983); *United States v. Voigt*, 89 F.3d 1050, 1064 n.4 (3d Cir. 1996); *United States v. DeMasi*, 40 F.3d 1306, 1318 n.12 (1st Cir. 1994); and *United States v. Jones*, 34 F.3d 495, 499 (7th Cir. 1994). These cases, however, do not (Cont'd)

In *United States v. Cloyd*, 819 F.2d 836 (8th Cir. 1987), a case nearly identical to the one at bar, the defendant was convicted of armed bank robbery (18 U.S.C. §§ 2113(a) and (d)), use of a firearm during a bank robbery (18 U.S.C. § 924(c)), and possession of a firearm following a felony conviction (18 U.S.C. App. § 1202(a)(1)). At sentencing the trial court fount that the appellant was subject to sentencing under the enhanced penalty portion of § 1202(a) because he had three previous robbery/burglary convictions. On appeal, the appellant claimed that the indictment was defective because it did not allege the three previous convictions. Although the government argued that the issue had not been preserved the Eighth Circuit disagreed, "An indictment which fails to allege an essential element, however, cannot be saved by judicial construction and, though challenged for the first time on appeal, will not support a conviction for an offense which requires the missing element. *United States v. Camp*, 541 F.2d 737 (8th Cir. 1976)."

In *United States v. Akpi*, 993 F.2d 229 (4th Cir. 1993) the Fourth Circuit held that the an effect on interstate commerce is an essential element of the crime of conspiracy to traffic in unauthorized access devices. Thus the failure to allege an effect on interstate commerce in an indictment charging this offense was a jurisdictional defect which could be raised for the first time on appeal. The court held that the failure to instruct the jury on interstate commerce was plain error and reversed the conviction. According to the court, "the jury must be instructed as to the essential elements of

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(Cont'd)
support the principle announced herein and in *Nealy* since these cases do not involve a claim that goes to the heart of a district court's jurisdiction, that is, the complete omission of an essential element of an offense.

the offense, and it is clear error not to do so. *Screws v. United States*, 325 U.S. 91, 106-07 (1945); *United States v. Harris*, 346 F.2d 182, 184 (4th Cir. 1965)." *See also United States v. Bo*, 186 F.3d 1177 (9th Cir. 1999) (holding that the complete failure to recite an essential element of an offense in an indictment was a jurisdictional defect that required reversal. In that case the defendant was convicted of interference with commerce by extortion, in violation of 18 U.S.C. § 1851 ("the Hobbs Act")); *United States v. Wabaunsee*, 528 F.2d 1 (7th Cir. 1975) (holding that an indictment was insufficient as a matter of law where it fails to allege an essential element of the offense sought to be charged but instead merely cites the statute section of the offense).

As this Court stated over a century ago, the omission of a necessary element of an offense is a "matter of substance, and not a defect or imperfection in matter of form only. . . ." *United States Carll*, 105 U.S. 611, 613 (1881).[3] Thus under

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3. Although this Court has held that the failure to submit an element of an offense to a petit jury is subject to harmless error analysis, *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827 (1999), *Neder* is not applicable here. First, the Eleventh Circuit never reached the question of harmless error, having found that the issue had been abandoned. Second, on its face, *Neder* applies to petit, not grand, juries. Third, an error in a petit jury instruction is "simply an error in the trial process itself," *id.* at 1833 (quotation marks omitted), which can be assessed in the context of the trial. Conversely, errors in a grand jury indictment allow only a "guess as to what was in the minds of the grand jury at the time. . . ." *See Russell v. United States*, 369 U.S. 749, 770 (1962)). Fourth, this Court focused on whether an error in a petit jury instruction would "necessarily render a trial fundamentally unfair." *Neder*, 119 S. Ct. at 1833. In the insufficient indictment context, the fact that a defendant received a fair trial and

(Cont'd)

the precedent of this Court the Eleventh Circuit was required to at a minimum determine whether Petitioner's conviction should be overturned because his indictment lacked a necessary element of the offense, and as such does not "properly allege an offense against the United States." *United States v. Morrison*, 536 F.2d 286, 289 (9th Cir. 1976).

## II.

## THE DECISION IN THE INSTANT CASE AS WELL AS THE DECISION UPON WHICH IT IS BASED, *UNITED STATES v. NEALY*, CONFLICT WITH THE WELL SETTLED PRECEDENT OF THIS COURT THAT DECISIONS RENDERED WHILE A CASE IS ON DIRECT REVIEW ARE RETROACTIVE TO THE CASE ON APPEAL

The decision of the Eleventh Circuit herein and in the decision upon which it relied *United States v. Nealy* conflicts with the decisions of this Court in *Griffin v. Kentucky*, 479 U.S. 314 (1987) and *Penry v. Lynaugh*, 492 U.S. 302, 314-15 (1989) which hold that decisions of the Supreme Court apply retroactively to cases on direct review or not yet final. In *United States v. Angle*, supra, the Fourth Circuit in a case identical to the one at bar, held that the decision of this Court

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(Cont'd)
suffered no prejudice is "irrelevant." *United States v. Daniels*, 973 F.2d 272, 275-76 (4th Cir. 1992). Until the Court applies Neder's holding to the grand jury context or otherwise alters its grand jury jurisprudence, the rule that a timely challenged indictment that fails to contain elements of a crime requires reversal per se shall remain "a vital part of our Federal criminal jurisprudence." *See United States v. Spinner*, 180 F.3d 514 (3d Cir. 1999) (decided after Neder) (internal quotation marks omitted).

in *Apprendi* was retroactive to cases still on direct appeal citing to this Court's decision in *Teague v. Lane*, 489 U.S. 288, 303-04 (1989). The Eleventh Circuit's failure to follow the precedent of this Court is an affront to this Court's authority and must be corrected.

## CONCLUSION

Review of this decision as well as the decision upon which it is based *United States v. Nealy* is necessary to restore uniformity within the circuits and conformity with prior decisions of this court holding that: (1) the failure of an indictment to allege an essential element of a crime is a jurisdictional defect which can be raised at any time; and (2) that a decision by this Court is retroactively applicable to cases still on direct review. As such this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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# APPENDIX

**APPENDIX A — PER CURIAM OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED APRIL 10, 2001**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-14064
Non-Argument Calendar

D. C. Docket No. 99-00004-CR-FTM-23

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BILLY GILCHRIST, JR., a.k.a. Head,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(April 10, 2001)

Before ANDERSON, Chief Judge, EDMONDSON and HULL, Circuit Judges.

*Appendix A*

PER CURIAM:

Billy Gilchrist, Jr. appeals from his conviction and life sentence imposed following a jury verdict of guilty for conspiracy to possess with intent to distribute cocaine base, in violation of 21 U.S.C. § 846. The prosecutor's questions about Gilchrist's efforts to obtain counsel for a co-conspirator and about his possession of a gun in an incident unrelated to this case did not constitute prosecutorial misconduct: insufficient prejudice; so, Gilchrist is not entitled a new trial. Because the jury instructions were legally accurate and did not impermissibly shift the burden of proof to Gilchrist, the district court did not err. Because the district court properly found that Gilchrist's offense involved more than 1.5 kilograms of cocaine base, his sentence was proper. No jurisdictional problem is present. And because he raised for the first time in his supplemental brief his challenge to the indictment's failure to include the amount of cocaine base as an element of the crime to be proven beyond a reasonable doubt, the issue is abandoned. *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000).

AFFIRMED.

*Appendix A*

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-14064

District Court Docket No.
99-00004-CR-FTM-23

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BILLY GILCHRIST, JR., a.k.a. Head,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion, included herein by reference, is entered as the judgment of this Court.

Entered: April 10, 2001
For the Court: Thomas K. Kahn, Clerk
By: McCombs, Elaine

**APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, FORT MYERS DIVISION DATED OCTOBER 5, 1999 AND FILED OCTOBER 6, 1999**

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**FT. MYERS DIVISION**

**99-4-CR-FTM-23D**

**UNITED STATES OF AMERICA**

**– vs –**

**BILLY GILCHRIST, JR.**

**Kevin C. Shirley, Retained**
**126 E. Olympia Ave., Suite 304**
**Punta Gorda, FL 33950**

**JUDGMENT IN A CRIMINAL CASE**
**(For Offenses Committed On or After November 1, 1987)**

The defendant was found guilty on Count One (1) of the Indictment. Accordingly, the defendant is adjudged guilty of such count(s) which involves the following offense(s):

*Appendix B*

| TITLE/ SECTION NUMBER | NATURE OF OFFENSE | DATE OFFENSE CONCLUDED | COUNT |
|---|---|---|---|
| 21 U.S.C. §846 | Conspiracy to Possess with Intent to Distribute Cocaine Base | January 20, 1999 | One (1) |

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and the Mandatory Victims Restitution Act of 1996.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 593-34-4615

Date of Imposition of Sentence: September 30, 1999

Defendant's Date of Birth: November 25, 1969

Defendant's U.S. Marshal No.: 32998-018

*Appendix B*

Defendant's Mailing
Address:
Hillsborough County Jail
Morgan Street
Tampa, FL 33602

Defendant's Residence
Address:
Same as Above

s/ Thomas J. Wiseman, Jr.
THOMAS J. WISEMAN, JR.
UNITED STATES DISTRICT
JUDGE

October 5th, 1999

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **LIFE w/o Possibility of Parole as to Count One (1) of the Indictment.**

The defendant is remanded to the custody of the United States Marshal.

* * *

*Appendix B*

## CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments. The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options in the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

**Total Assessment**

$100.00

The Special Assessment shall be due immediately.

## FINE

No fine imposed.

## RESTITUTION

No Restitution was ordered.

## STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report except as to paragraphs 21 and 22. The Court finds the defendant should only be held accountable for 12.2 kilograms of cocaine base. This did not change the applicable guideline range.

*Appendix B*

**GUIDELINE RANGE DETERMINED BY THE COURT:**

| | |
|---|---|
| Total Offense Level: | 40 |
| Criminal History Category: | VI |
| Imprisonment Range: | Life |
| Supervised Release Range: | 10 years |
| Fine Range: | $25,000 to 8,000,000 |

Fine is waived or is below the guideline range, because of the defendant's inability to pay.

The sentence is within the guideline range, that range does not exceed 24 months, and the Court finds no reason to depart from the sentence called for by the application of the guidelines.

## APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION DATED APRIL 14, 1999 AND FILED APRIL 15, 1999

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**TAMPA DIVISION**

Case No. 99-4-Cr-FtM-23D

UNITED STATES OF AMERICA

vs.

BILLY GILCHRIST, JR.,

**JUDGMENT**

This cause having come on for trial by jury and before the Court, and the jury having returned a verdict of not guilty as to Count Two of the Indictment, it is

ORDERED AND ADJUDGED:

The defendant, Billy Gilchrist, Jr., is not guilty of the offense charged against him in Count Two of the Indictment.

DONE AND ORDERED at Tampa, Florida this fourteenth day of April, 1999.

s/ Thomas A. Wiseman, Jr.
THOMAS A. WISEMAN, JR.
UNITED STATES DISTRICT JUDGE

**APPENDIX D — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JUNE 15, 2001**

**IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

No. 99-14064-AA

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BILLY GILCHRIST, JR., a.k.a. Head,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: ANDERSON, Chief Judge, EDMONDSON and HULL, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the

*Appendix D*

Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ J.L. Edmondson
UNITED STATES CIRCUIT JUDGE